the action and to be named class representatives of Berry's alleged victims.

On February 4, 2000, the district court issued an order dealing with these various motions. The court approved the settlement of three of the named plaintiffs, but ordered a hearing on Guy's claim that his attorneys were not authorized to settle on his behalf. The court rejected Johnson and Jones' motions to intervene, but reserved decision on their request for class certification. Subsequently, on February 28, 2000, the court rejected Guy's contentions, approved his settlement, and dismissed his claims. App. 111a. The Sixth Circuit subsequently affirmed this disposition on appeal. *Id.* at 105a-119a.

The district court decided the class certification and notice issues on April 4, 2000. The court first considered and rejected Johnson and Jones' request for class certification, finding that the proposed class failed to meet the numerosity requirement of Rule 23(a). App. 101a-104a. The court noted the "enormous amount of publicity about the case" and its belief "that it is unlikely that many more alleged victims will come forward." *Id.* at 104a. Further, the court reasoned that it was not required to give "settlement notice to an invalid class." *Id.* at 103a. Johnson and Jones appealed these decisions.

B. *Doe I*

On May 3, 2000, shortly after filing the foregoing appeal, Johnson and Jones, along with seven John Does, filed a second complaint raising essentially the same factual and class allegations as in *Guy*. *Doe* v. *Miller*, No. 00-166-KSF ("*Doe I*"). After discovery and full briefing on the issue, the district court denied class certification on June 28, 2002. App. 99a-100a. The parties' settlement of their individual claims was approved by the district court on that same day. Some four months later, on October 15, 2002, Johnson and Jones withdrew their still-pending appeal of the April 4, 2000 order that had denied class certification and notice in *Guy*.

C. *Doe II*

On September 25, 2002, another group of John Does, represented by one of the same attorneys for the plaintiffs in *Doe I*, filed yet another class complaint. *Doe #1-33* v. *LFUCG*, No. 02-439-JMH ("*Doe II*"). This complaint mirrored those in the prior lawsuits. On April 23, 2003, the district court dismissed the complaint as time-barred. App. 70a-98a.

D. *Doe III*

Once again, on the same day *Doe II* was dismissed, another group of John Does represented by the same attorneys filed a fourth class action raising essentially the same issues on behalf of other John Does. *Doe #1-44* v. *LFUCG*, No. 03-12-JMH ("*Doe III*"). The district court also dismissed this action as barred by the statute of limitations on November 21, 2003. App. 20a-49a.

E. The Plaintiffs' Motions To Vacate The Final Judgments In *Guy* And *Doe I*

The unsuccessful plaintiffs in *Doe II* and *Doe III* whose claims had been dismissed filed motions to intervene in *Guy* and *Doe I*, coupled with Rule 60(b)(4) motions to reopen the final judgments in those two cases. Their apparent objective was to turn back the clock on the statutes of limitations which had resulted in the dismissal of their claims in *Doe II* and *Doe III* and intervene in the first two actions in this series of cases, *Guy* and *Doe I*. Rule 60(b)(4) permits a court to take the extraordinary action of setting aside a judgment if the "judgment is void." Fed. R. Civ. P. 60(b)(4). As to the plaintiffs' request in *Guy*, the district court noted that "[a] judgment is void under 60(b)(4) 'if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or of it acted in a manner inconsistent with due process of law.'" App. 63a (alteration in original) (citing *Antoine* v. *Atlas Turner, Inc.*, 66 F.3d 105, 108 (6th Cir. 1995)). The district court rejected plaintiffs' argument that their due process rights were violated when it denied notice to "members" of the non-existent class

in *Guy*. The court reasoned that, although there was some authority requiring notice to a putative class (*i.e.*, an alleged but not yet certified class), "[i]t is another matter altogether, . . . that Rule 23(e) could apply in a case where a court has expressly denied class certification, and thus determined that the action is not a class action." *Id.* at 64a. Accordingly, the district court declined to upset the earlier judgment and refused the motion to intervene. *Id.* at 60a-69a.[1]

F. The Sixth Circuit's Decision

The plaintiffs in *Doe II* and *Doe III* appealed the denials of their request for relief under Rule 60(b)(4) to the Sixth Circuit. They contended that the district court's decisions not to issue notice under Rule 23(e) in *Guy* and *Doe I* violated that Rule and the Due Process Clause of the Fifth Amendment of the Constitution, and that these alleged violations justified relief under Rule 60(b)(4). App. 7a-8a. The Sixth Circuit held that Rule 23(e) was violated and reversed.

It observed that "[m]ost courts have found that Rule 23(e)'s notice requirement applies to putative class members as well as to certified class members."[2] App. 8a-9a (emphasis omitted) (citing to opinions of the Seventh, Eighth, Ninth and Eleventh Circuits). The Sixth Circuit recognized that other courts "have not required notice to putative class members as a general rule." *Id.* at 9a. But it noted that even these courts

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[1] The district court reached the same result in *Doe I*, also rejecting the plaintiffs' request to re-open the judgment in that case. App. 50a-59a.

[2] The Sixth Circuit addressed the language of Rule 23(e) prior to its amendment in 2003. Critically, however, both the current and prior versions of Rule 23(e) required notice only to members of a "class." *Compare* Fed. R. Civ. P. 23(e) (2003) ("notice of [a] proposed dismissal or compromise shall be given to all *members of the class* in such manner as the court directs") (emphasis added), *with id.* 23(e)(1)(B) (2005) ("The court must direct notice in a reasonable manner to all *class members* who would be bound by a proposed settlement, voluntary dismissal, or compromise.") (emphasis added).

"have warned that a failure to provide notice is justified only in instances free of prejudice and collusion." *Id.*

The Sixth Circuit acknowledged that most of the cases it had canvassed involved putative classes. In both *Guy* and *Doe I,* by contrast, class certification had been denied. The court below noted, however, that in *Culver* v. *City of Milwaukee*, 277 F.3d 908 (7th Cir. 2002), and *Birmingham Steel Corp.* v. *TVA*, 353 F.3d 1331 (11th Cir. 2003), the Seventh and Eleventh Circuits had required notice where district courts had initially certified classes, then later de-certified them as improper. App 8a-9a. Based on its review of this caselaw, the Sixth Circuit concluded:

> that Rule 23(e) applies in a precertification context where putative class members are likely to be prejudiced. Moreover, because of the public policy considerations involved, we further adopt the reasoning articulated by the Seventh Circuit in *Culver* that Rule 23(e) may be applied where the district court has already rejected class certification.

Id. at 13a-14a.

The court set forth a multi-factor test for identifying when the possibility of prejudice might require notice, including the level of press coverage of the alleged class action. Applying this test to the facts of this case, the Sixth Circuit concluded that the district court had "abused its discretion in not providing notice in both *Guy* and *Doe I*." App. 13a. In reaching this conclusion, the Sixth Circuit noted that "the local media devoted substantial coverage to the abuse [committed by Berry] . . . . including coverage of the *Guy* and *Doe I* lawsuits." *Id.* The court therefore assumed—incorrectly—that this media attention had led the plaintiff-appellants to rely on those actions to represent their interests. *Id.*[3] In addition, the

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[3] This assumption overlooks the uniform testimony of each plaintiff who was deposed in *Doe II* stating that they first became aware of their potential claims against the defendants during the summer of 2002, when

Sixth Circuit took issue with the district court's conclusion in *Guy* that there were likely few members in the class. Given how long Berry had run the youth program, the Sixth Circuit concluded that "[t]here was in fact substantial reason to believe that many more victims would come forward, as in fact actually occurred with the filing of the *Doe II* and *Doe III* lawsuits." *Id.*

On the question of relief under Rule 60(b)(4), the Sixth Circuit acknowledged that the governing test is quite stringent: a judgment is "void" within the meaning of the rule only if the district court lacked jurisdiction or acted in a manner that violates due process. App. 8a. Based merely on its finding that the district court had "abused its discretion" and "erred in failing to provide notice," the Sixth Circuit voided and vacated the judgment of dismissal in *Guy* under Rule 60(b)(4). *Id.* at 13a-14a. The court of appeals, however, declined to disturb the judgment in *Doe I* to "reach[] the equitable result of allowing the Does to go forward with their case while preserving the settlement reached by the *Doe I* parties." *Id.* at 14a.

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the media reported the settlement of *Doe I*. This testimony established that these plaintiffs 1) were not aware of the *Guy* action so they could not have relied on its pendency and 2) were on actual notice of the settlement of *Doe I* and therefore could not have been prejudiced by a failure to receive notice. Consolidated Final Brief of Defendants-Appellees at 31, *Doe* v. *Lexington-Fayette Urban County Gov't*, Nos. 03-6490 & -6517 (6th Cir. filed May 21, 2004).

REASONS FOR GRANTING THE PETITION

I. WHETHER RULE 23(e) AUTHORIZES COURTS TO REQUIRE NOTICE IN CASES WHERE CLASS CERTIFICATION IS DENIED IS AN IMPORTANT QUESTION ON WHICH THE COURTS OF APPEALS DISAGREE.

A. There Is A Conflict Among The Courts Of Appeals.

The Sixth Circuit has created a conflict among the circuits on an important question of class action procedure. The decision in this case conflicts with decisions of the Fifth and Second Circuits, which have held that Rule 23(e)'s notice requirements do not apply where class certification is denied. The Sixth Circuit's ruling is also irreconcilable with the reasoning of the Ninth and Fourth Circuits, which have likewise recognized the inapplicability of Rule 23(e)'s notice requirements in such circumstances.

As this Court has recognized, class certification is a signal event in a class action lawsuit. *Baxter* v. *Palmigiano*, 425 U.S. 308, 311 n.1 (1975) (without "certification and identification of the class, the action is not properly a class action"). Until certification, "a class action is supported solely by the pleadings, which may or may not have a foundation in fact compatible with the requirements of rule 23(a) and (b)." Comment, *Continuation and Representation of Class Actions Following Dismissal of the Class Representative*, 1974 Duke L.J. 573, 596 & n.100 ("Prior to certification, the class is only a denominated or putative class rather than an independent entity before the court."). Thus, as the Fourth Circuit has aptly stated, it is the actual certification:

> which alone gives birth to "the class as a jurisprudential entity," changes the action from a mere individual suit with class allegations into a true class action qualifying under 23(a), and provides that sharp line of demarcation

> between an individual action seeking to become a class action and an actual class action.

Shelton v. *Pargo, Inc.*, 582 F.2d 1298, 1304 (4th Cir. 1978).

Certification ensures that absent class members are bound to any final judgment or settlement secured by the named representative plaintiff. Because of this binding effect, "[o]nce the suit is certified as a class action, it may not be settled or dismissed without the approval of the court." *Sosna* v. *Iowa*, 419 U.S. 393, 399 n.8 (1975). And, following class certification, notice of a dismissal or settlement of the named plaintiffs' claims must be provided to protect the rights of absent class members. By contrast, where a court denies certification, the jurisprudential entity of the class never comes into being, and those persons who were formerly putative members of the alleged class will not be bound by any decisions in, or disposition of, the litigation.

Unlike the Sixth Circuit below, the Fifth Circuit has recognized that, once class certification is denied, Rule 23(e)'s notice requirements do not apply. In *Pearson* v. *Ecological Science Corp.*, 522 F.2d 171 (5th Cir. 1975), the Fifth Circuit noted that, "to protect the rights of absent class members during the 'interim between filing and the [class certification] determination' . . . . , other courts have required that for purposes of the notice provisions of [Rule 23] that the action be presumed proper for class determination." *Id.* at 177. But the Fifth Circuit "decline[d]" to "extend the judicial gloss on subdivision (e) of Rule 23 to encompass the situation where . . . the trial court has determined . . . that the action may not be maintained as a class action under Rule 23." *Id.* In that circumstance, "the notice requirements of Rule 23(e) *do not apply*, at least where the dismissal and settlement of the action do not directly affect adversely the rights of individuals not before the court." *Id.* (emphasis added). "'[A] *negative determination* (of class action status) means that *the action should be stripped of its character as a class action.*'" *Id.* (quoting Advisory Committee Notes to Rule 23, 39 F.R.D.

104). The Fifth Circuit has adhered to this rule since *Pearson*. See *Jones* v. *Caddo Parish Sch. Bd.*, 735 F.2d 923, 937 n.16 (5th Cir. 1984) ("we have held that notice to the class of denial of class certification is not necessary"); *Roper* v. *Consurve, Inc.*, 578 F.2d 1106, 1110 (5th Cir. 1978) (quoting *Pearson*'s holding).

The Sixth Circuit mistakenly suggested that *Pearson* supported its decision to require notice to a non-class. See App. 9a (introducing *Pearson* with a *cf.* cite). The Sixth Circuit apparently believed that, in leaving open the possibility that Rule 23(e)'s notice requirement could apply where dismissal would "directly affect adversely the rights" of former putative members, *Pearson* contemplated Rule 23(e) notice to prevent the type of "prejudice" that concerned the Sixth Circuit here—*i.e.*, the possible running of the limitations period following a denial of certification. In fact, *Pearson* expressly rejected the notion that this was a type of "prejudice" at all.

The Fifth Circuit noted in *Pearson* that the former putative class members in that case could have filed lawsuits within the limitations period after the district court denied class certification. 522 F.2d at 179. Even though no notice of the class denial had been provided, the Fifth Circuit stated that any person who had failed to file a suit after the certification denial "can blame no one but himself if his action is now barred: 'If such a bar does exist, it is the result of . . . lethargy and indifference and not the breach of any duty . . . on the part of the plaintiff or the Court.'" *Id.* (quoting *Polakoff* v. *Delaware Steeplechase & Race Ass'n*, 264 F. Supp. 915, 916 (D. Del. 1966)). Thus, the Fifth Circuit plainly viewed the possibility that the limitations period might run on former putative class members following a denial of class certification as a problem attributable to those former putative class members, not a type

of "prejudice" requiring a defendant to shoulder the burden of providing notice to "members" of a non-existent class.[4]

The Fifth Circuit's reasoning thus confirms the square conflict between the holding in *Pearson* and the decision below. Just as in *Pearson*, the former putative class members in *Guy* could have filed new actions within the limitations period even after class certification was denied, as the *Doe I* complaint illustrates. In this very circumstance, the Fifth Circuit has ruled that Rule 23(e)'s notice requirements do not apply, whereas the Sixth Circuit has ruled that those requirements do apply in such circumstances, and that the district court here abused its discretion by failing to require notice.

The Sixth Circuit's notice rule also conflicts with a recent unpublished decision of the Second Circuit. In that case, as in *Pearson*, a party argued that, under Rule 23(e), a district court had a duty, after denying class certification, to ensure that former putative class members received notice of the class certification denial. *Fuller* v. *Instinet, Inc.*, 120 Fed. App'x 845, 846 (2d Cir. 2004). The Second Circuit rejected that claim, holding that, "[b]y its terms, former Rule 23(e) does not require notice to potential class members on a denial of class certification." *Id.* The appellant in *Fuller*, like respondents here, relied on the Seventh Circuit decision in *Culver*. In stark contrast to the decision below, however, the Second Circuit "decline[d] to adopt the rule or reasoning of *Culver* in light of the plain language" of the Rule. *Id.* at 847.[5]

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[4] By contrast, *Simer* v. *Rios*, 661 F. 2d 655 (7th Cir. 1981), provides an example of how settlement of a non-class action can "directly affect adversely the rights of individuals not before the court," *Pearson*, 522 F.2d at 177, within the meaning of *Pearson*. In *Simer*, a putative class action was settled through payment of money from a limited pool of funds. As a result, even though non-parties were not "bound" by the settlement in any legal sense, their rights were directly and adversely affected, because they were deprived of a chance for full recovery on their own claims. 661 F.2d at 667.

[5] Even before *Fuller*, district courts in the Second Circuit had followed the principle that Rule 23(e)'s notice requirements do not apply where

The decision below is also inconsistent with the reasoning, if not the holdings, of the Ninth Circuit in *Diaz* v. *Trust Territory*, 876 F.2d 1401 (9th Cir. 1989), and the Fourth Circuit in *Shelton* v. *Pargo, Inc.*, 582 F.2d 1298 (4th Cir. 1978). In *Diaz*, the Ninth Circuit stated categorically that, "if the court determines for any reason that class certification should be denied, it can thereafter dismiss the class allegations without notice. In other words, Rule 23(e) notice is not required where the dismissal is involuntary." 876 F.2d at 1406 (citing *Roper*, 578 F.2d at 1110, which relies on *Pearson*).

In *Shelton*, the Fourth Circuit undertook a careful analysis of whether district courts were required to follow a procedure, first adopted in *Philadelphia Electric Co.* v. *Anaconda American Brass Co.*, 42 F.R.D. 324 (E.D. Pa. 1967), whereby pre-certification settlements and motions to dismiss were held in abeyance until a ruling on class certification. Under this procedural rule, Rule 23(e) notice could be dispensed with "[o]nly if [class] certification were found improper." *Shelton*, 582 F.2d at 1309. Significantly, the Fourth Circuit accepted the premise that notice was not required when class certification was denied, but rejected as "inflexible and formalistic" a procedural rule that allowed courts to dispense with notice *only* in that situation. *Id.* The court held that, even when class certification has not been denied, a putative class action can still be dismissed without notice as long as the district court does not find that the "settling plaintiff has used the class action claim for unfair personal aggrandizement in the settlement, with prejudice to absent putative class members." *Id.* at 1314.

Indeed, the Fourth Circuit expressly questioned the very concept of "prejudice" that, according to the Sixth Circuit,

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class certification is denied. *See, e.g.*, *Sheinberg* v. *Fluour Corp.*, 91 F.R.D. 74, 75 (S.D.N.Y. 1981) ("[N]one of the reasons which underlie the notice requirements of Fed.R.Civ.P. 23 and 23.1 with respect to voluntary discontinuances are operative here; no one's rights are being cut off and no potential abuses are present.").

mandated notice in this case. The Fourth Circuit explained that, because a pre-certification dismissal does not bind absent putative class members, such members have "at best a mere reliance interest" that is "often thought to be so 'speculative' as to warrant little or no consideration." *Id.* at 1314-15 (internal quotation marks omitted). This is because "reliance can occur only on the part of those persons" who both "learn[] of the action through the news media or some other secondary source" and "are sophisticated enough in the ways of the law to understand the significance of the class action allegation." *Id.* at 1315 (internal quotation marks omitted).[6] Indeed, in this case, the Sixth Circuit's finding of "prejudice" rests not only on the factually incorrect assumption that the former putative class members in *Guy* were aware of that case, see note 3, *supra*, but on the further assumptions that those persons (a) understood that the case was a class action, (b) understood that a class action tolled the statute of limitations on their own claims, and (c) expected to be notified of any dismissal that might deprive them of the benefit of such tolling.

In fact, this Court's reasoning in *American Pipe* does not support the premise that former putative class members are "prejudiced" by the dismissal of an action that does not qualify as a class action. In *American Pipe*, this Court held that the pendency of a putative class action tolls the statute of limitations for all putative class members, even those "unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings." 414 U.S. at 552. Tolling was dictated not by reliance interests but by the language of Rule 23 itself, which makes clear that a class action was "no longer 'an invitation to join-

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[6] For these reasons, the Fourth Circuit held that, "[i]n weighing whether to require a certification determination and notice under the foregoing rule, the District Court 'should focus primarily on the possibility that the pre-certification compromise is the product of collusion.'" *Shelton*, 582 F.2d at 1314.

der,'" as it had been prior to 1966, but "a truly representative suit," the "commencement of [which] satisfie[s] the purpose of the limitation provision as to all those who might subsequently participate in the suit." *Id.* at 550, 551.

Thus, class action tolling is not a rule of equity designed to protect presumed reliance interests of putative class members. Instead, it is a rule compelled by the plain language of Rule 23 that confers benefits on all class members, including those who are "mere passive beneficiaries." *Id.* at 552. In essence, the Sixth Circuit has concluded that a benefit derived from the language of Rule 23 creates reliance interests that justify overriding the language of Rule 23(e), which both today and at the time of the *Guy* litigation authorizes notice to a "class." Under the Sixth Circuit's reasoning, therefore, class allegations that are unfounded—indeed, that were found, in this case, to be frivolous by another panel of the Sixth Circuit, App. 107a—not only confer the benefit of tolling, they authorize courts to require Rule 23 notice where no Rule 23 class exists. In *Pearson* and *Fuller*, the Fifth and Second Circuits properly rejected this counter-intuitive result. This Court should grant the petition to resolve this fundamental conflict.

B. The Issue Is Important.

This conflict over class action procedure is extremely important. Nearly 2,700 new federal class actions were filed during the 12-month period ending September 30, 2004, and a total of 5,179 such actions were pending during this period. See L. Mecham, Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts* tbls. X-4 & X-5 (2004), http://www.uscourts.gov/judbususc/judbus.html. Class certification is denied in slightly more than one-fourth of all federal class actions. See Thomas E. Willging & Shannon R. Wheatman, Fed. Judicial Ctr. *Attorney Reports on the Impact of Amchem and Ortiz on Choice of a Federal or State Forum in Class Action Litigation: A Report to the Advisory Committee on Civil Rules Regarding a Case-based Survey of Attor-*

neys 34 tbl.10 (2004). By concluding that Rule 23(e) authorizes courts to require notice even where class certification is denied, the Sixth Circuit's rule imposes significant and wholly unjustified costs on litigants, and unnecessarily burdens district courts that oversee class action litigation.

This Court has recognized that the costs of providing class action notice can be substantial, but that such costs are necessary because a valid class action will bind absent members. Thus, this Court has held that "[t]here is nothing in Rule 23 to suggest that the notice requirements can be tailored to fit the pocketbooks of particular plaintiffs." *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). Instead, "[i]ndividual notice must be sent to all class members whose names and addresses may be ascertained through reasonable effort." *Id.* at 173; see also *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.").

The rationale for imposing such costs, however, is wholly inapplicable where class certification is denied. In that circumstance, the former putative members of the invalid class cannot be bound by any disposition of the case. Yet, under the Sixth Circuit's misguided interpretation, Rule 23(e) authorizes courts to impose the significant expense of notifying "members" of non-existent classes that actions improperly instituted on their behalf have been dismissed.

The Sixth Circuit's interpretation also imposes burdens on the courts that must oversee notice to a non-class. It is not at all clear what constitutes "reasonable" notice to members of a non-existent class, particularly where, as here, class certification is denied for lack of numerosity. The Sixth Circuit faulted the district court in *Guy* and *Doe I* for failing to recognize that the longevity of the Berry's youth program would

likely result in many victims. This revisionist view, however, overlooks the finding of an earlier Sixth Circuit panel that the class allegations in *Guy* were frivolous, App. 107a, as well as the fact that few victims had come forward despite the widespread coverage of Berry's conviction and the filing of the *Guy* suit itself. In light of the facts known to the district court, determining what notice would have been sufficient to protect the speculative reliance interests of what the district court reasonably thought to be a relatively small number of unknown victims would have been fraught with difficulties, especially because many of the victims could have long since left the Lexington area. The Sixth Circuit's conclusion Rule 23(e) applies when class certification is denied will force courts to fashion guidelines and principles to govern notice determinations in these and other unusual circumstances—efforts that are entirely unnecessary under a proper interpretation of Rule 23(e).

The costs to litigants and the courts of the Sixth Circuit's novel ruling underscore the necessity of review by this Court. Rule 23(e)'s notice requirements must apply uniformly throughout the nation; an obligation to provide costly notice to a non-existent class should not depend on the fortuity of the circuit in which the litigants reside. As this Court explained in *Amchem Products, Inc.* v. *Windsor*, 521 U.S. 591 (1997):

> courts must be mindful that . . . Rule [23] as now composed sets the requirements they are bound to enforce. Federal Rules take effect after an extensive deliberative process involving many reviewers: a Rules Advisory Committee, public commenters, the Judicial Conference, this Court, the Congress. See 28 U.S.C. §§ 2073, 2074. The text of a rule thus proposed and reviewed limits judicial inventiveness. Courts are not free to amend a rule outside the process Congress ordered . . . .

Id. at 620. Both the current and prior versions of Rule 23(e) authorize notice to members of a "class," which the district

court properly concluded did not exist in *Guy*. The Sixth Circuit was bound to apply that rule as written, rather than expand its scope and impose burdensome and costly additional notice requirements. Accordingly, this Court should grant the petition to resolve this important issue of class action procedure.

II. THE SIXTH CIRCUIT'S RULE PERMITTING A FINAL JUDGMENT TO BE VOIDED BASED ON A MERE ABUSE OF DISCRETION WARRANTS THIS COURT'S REVIEW.

A. The Sixth Circuit's Unduly Permissive Standard For Voiding Judgments Under Rule 60(b)(4) Conflicts With The Standards Adopted By Other Circuits.

The Sixth Circuit compounded its misinterpretation of Rule 23(e) by holding that a mere abuse of discretion in connection with a notice determination is grounds for voiding a long final judgment under Rule 60(b)(4). This extraordinary ruling conflicts with the decisions of other courts of appeals, which bar such relief based on mere errors or abuses of discretion and do not permit non-parties to void a final judgment. This conflict is also important, not only because it undermines the bedrock importance of finality generally, but does so in the class action context, further complicating efforts to settle these expensive lawsuits.

Rule 60(b)(4) permits a final judgment to be vacated no matter how far in the past a case may have ended. Fed. R. Civ. P. 60(b)(4); *Klapprott* v. *United States*, 335 U.S. 601, 609 (1949) ("Amended Rule 60(b) authorizes a court to set aside 'a void judgment' without regard to the limitation of a year applicable to motions to set aside on some other grounds."). Given the importance of finality, however, other courts have applied Rule 60(b)(4) narrowly. Thus, in stark contrast to the ruling below, both the First and Seventh Circuits have squarely held that an abuse of discretion is *not* a

sufficient ground for voiding a final judgment, and that such relief may be granted only where the court lacked power over the parties or subject matter, or violated due process.

In *Federal Election Commission* v. *Al Salvi for Senate Committee*, 205 F.3d 1015 (7th Cir. 2000), the Seventh Circuit refused to void a judgment of dismissal despite its conclusion that "the district court abused its discretion in dismissing [an] action with prejudice" for failure to comply with the district court's local counsel rules. *Id.* at 1017. The Seventh Circuit explained that, "[w]hile we believe the district court's failure to warn of the impending dismissal constituted abuse of discretion, under the facts of this case it cannot be said that the district court's discretionary abuse rose to the level of due process deprivation." *Id.* at 1019. Accordingly, it denied relief under Rule 60(b)(4).

Similarly, in *O'Rourke Bros., Inc.* v. *Nesbitt Burns, Inc.*, 201 F.3d 948 (7th Cir. 2000), the Seventh Circuit explained that "[a] void judgment is not synonymous with an erroneous judgment. Even gross errors do not render a judgment void." *Id.* at 951. Instead, "[a] judgment is void if the rendering court was without power to enter it; that is, if the court entered a decree 'not within the powers granted to it by the law.'" *Id.* (quoting *United States ex rel. Wilson* v. *Walker*, 109 U.S. 258 (1883)). Applying those principles, the Seventh Circuit refused to void the judgment at issue, concluding that, although involuntary dismissals for failure to effect service "may be frowned on, or even reversed, they are not found to be beyond the power of the court." *Id.* at 952.

The Seventh Circuit has voided a judgment based on a failure to provide notice to a putative class, but only after concluding that such a failure was more than an abuse of discretion, and rose to the level of a due process violation. In *Simer* v. *Rios*, 661 F.2d 655 (7th Cir. 1981), the court concluded that the rights of absent members of a putative class (*i.e.*, an alleged, pre-certification class) were adversely affected by a settlement and dismissal of the named plaintiffs' claims, be-

cause the settlement distributed a limited pool of funds in a manner that impaired absent members' ability to receive full redress for their injuries. *Id.* at 667. Adhering to the principle that "[m]ere error in the entry of a judgment does not render a judgment void for purposes of Rule 60(b)(4)," the court concluded that relief was nevertheless required because, in the case before it, "entry of the settlement decree without notice to putative class members violated the due process rights of the class members." *Id.* at 663.

The First Circuit applies these same principles. In *Hoult* v. *Hoult*, 57 F.3d 1 (1st Cir. 1995), the First Circuit explained that "[a] judgment is not void simply because it is or may been erroneous; it is void only if, from its inception, it was a legal nullity." *Id.* at 6. In that case, the party seeking to void an earlier judgment argued that the district court's admission of certain expert testimony commenting on the credibility of the plaintiff, an alleged victim of childhood sexual abuse, so usurped the role of the jury that it violated due process. *Id.* The First Circuit noted that the expert's testimony "may have crossed the line," but that, under Rule 60(b)(4), it could "review not for abuse of discretion or plain error, but only for a plain usurpation of the jury's function constituting a violation of due process." *Id.* at 7 (internal quotation marks omitted). Because it found no constitutional violation, the court denied relief. *Id.* at 7-8.

In the decision below, of course, the Sixth Circuit did not conclude that the failure to provide notice to members of a non-existent class rose to the level of a due process violation. Nor could it have done so: these absent non-parties were not bound by the judgment in *Guy*, and they made no showing that the monetary settlement provided to the *Guy* plaintiffs would have impaired their ability to collect full damages had they brought their own timely action. Similarly, the Sixth Circuit did not find, and could not have found, that the district court in *Guy* lacked jurisdiction over the subject matter or parties. Instead, it granted relief under Rule 60(b)(4) based

solely on its determination that the district court had "abused its discretion" and "erred in failing to provide notice." App. 13a-14a. That ruling inescapably conflicts with the rulings of the Seventh and First Circuits described above.

The decision below also implicates a subsidiary issue under Rule 60(b)(4) on which the lower courts are divided. In accordance with the language of the Rule itself, the Seventh Circuit has held that only parties to the original judgment, their legal representatives or those in privity with a party may invoke Rule 60(b). See *United States* v. *8136 S. Dobson St.*, 125 F.3d 1076, 1084 (7th Cir. 1997). The Second Circuit has taken a somewhat broader view of who may seek relief under Rule 60(b), though not as broad as the view adopted by the Sixth Circuit in the decision below. In *Dunlop* v. *Pan American World Airways, Inc.*, 672 F.2d 1044 (2d Cir. 1982), the court noted that relief "would not ordinarily be available to non-parties." *Id.* at 1052. Nevertheless, it concluded that where the Secretary of Labor sued an airline under the Age Discrimination Act and Fair Labor Standards, airline pilots on whose behalf the suit was brought, and whose rights under both federal and state law were extinguished by a settlement that afforded them no actual relief, were "sufficiently connected and identified with the Secretary's suit" that they could seek relief under Rule 60(b). *Id.*

In contrast to these courts, the Sixth Circuit voided a judgment on behalf of persons who were indisputably not parties to that judgment, and whose rights were not extinguished by the settlement in that case. Indeed, while the Sixth Circuit faulted the district court's notice decision, it did not rule that the district court should have certified the class in *Guy*, nor, as just noted, did it find that the settlement impaired the Respondents' ability to pursue their own remedies through a timely action. Thus, the court of appeals has created a split with its sister circuits by permitting any person alleging an interest in the litigation, including, as here, a speculative reli-

ance interest, to void a judgment in a case to which he or she was not a party.

B. The Issue Is Recurring And Important.

The Sixth Circuit's wayward interpretation of Rule 60(b)(4) is important to civil litigation generally. The holding threatens to undo any final judgment, no matter how old, based on nothing more than an abuse of discretion. For this reason alone, this Court should clarify the requirements for voiding judgments under Rule 60(b)(4).

But the Sixth Circuit's decision warrants review for the additional reason that it creates uncertainty in the class action context, calling into question old settlements and dismissals, and reviving expired statutes of limitations. As noted above, because certified class actions bind absent members, such an action may not be settled or dismissed without the approval of the court, following notice to members of the class. And courts have, to varying degrees, extended these same protections to the settlement of putative class actions. Thus, the thousands of class actions filed and pending each year are subject to a variety of procedural safeguards that make them (appropriately) far more difficult to settle.

The Sixth Circuit's decision in this case, however, adds unwarranted complexity and uncertainty to settlements even when a district court has found that the prerequisites to class status are not satisfied—and thus, where the action should stand on the same footing as any other individual suit for settlement purposes. In this case, the Sixth Circuit voided a settlement based on a finding of abuse of discretion, which in turn rested on speculative and inaccurate assumptions about reliance on the filing of an action. The risk that a settlement, achieved can be undone years after the fact, and even where class certification was properly denied, can only serve to discourage future settlement efforts in class actions.

The stated justification for the significant confusion and uncertainty caused by the Sixth Circuit's expansive interpre-

tation of Rule 60(b) and the notice requirements for non-class members was "public policy" grounds. App. 13a-14a. Yet, as "[t]his Court has long recognized . . . '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.'" *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981) (second alteration in original). The important issues of finality and class action procedure raised by the Sixth Circuit's decision in this case require this Court's resolution.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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